STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2007
v	No. 268340 Lake Circuit Court
ROBERT LEON BEANE, JR., Defendant-Appellant.	LC No. 05-004351-FC ON RECONSIDERATION

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant, charged with safe breaking, MCL 750.531, and breaking and entering a building with the intent to commit larceny, MCL 750.110, filed a motion to suppress his confession. The Lake Circuit Court granted the motion, suppressed the confession, and subsequently dismissed the case on the basis of insufficient evidence. Plaintiff appealed as of right. We reversed the trial court's suppression of defendant's confession, holding that defendant's statement to the police did not constitute an unambiguous, unequivocal invocation of his constitutional right to counsel, and remanded for further proceedings. *People v Beane, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 268340). We granted defendant's motion for reconsideration and vacated the May 24, 2007 opinion. Upon reconsideration, we affirm the trial court's suppression of defendant's confession.

We review a trial court's conclusions of law and application of the law to the facts regarding its decision to suppress a confession, de novo. *People v McBride*, 273 Mich App 238, 249; 729 NW2d 551 (2006). However, the trial court's factual findings are reviewed for clear error. *Id.* A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake was made. *Id.*

In plaintiff's brief on appeal, the prosecution argues that defendant did not, during the police interrogation, make an unequivocal request for an attorney. A majority of the Court agreed with that proposition, and thus reversed the trial court. On reconsideration, however, we conclude that the prosecution has waived that argument, and that the only other issue in support of reversal is without merit.

An elementary proposition of appellate law is that "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA of Michigan (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006), citing *People v Carter*,

462 Mich 206, 215; 612 NW2d 144 (2000); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002), and *Marshall Lasser PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

The record[1] firmly establishes that, at the suppression hearing, the prosecutor repeatedly conceded that defendant made an unambiguous, unequivocal invocation of his constitutional right to counsel. Recognizing as much, the prosecutor argued that the trial court should nonetheless grant the motion to suppress because defendant's assertion of his right to counsel did not act as a "blanket prohibition" that prevented the police from questioning him about other incidents.

> *[Defendant] ends up saying that he would like to speak with an attorney*. . . . So the question I believe, lies primarily whether or not, *if a defendant asserts his right to an attorney*, whether that is what they call a blanket prohibition, or whether or not that is a determination to cease questioning on that subject. . . . *We understand that he did assert his right to that particular matter*. No further statements were made on that particular point. . . . It's a question of, if he asserts them in this one matter, is that a blanket prohibition on all further questioning? [emphasis added]

The prosecutor also pointed out to the trial court that the police acknowledged during the interrogation that defendant had made an unambiguous, unequivocal invocation of his constitutional right to counsel regarding the subject matter they were talking about when he asserted his right to counsel.

> The officers, I believe, followed the determination that that is a determination to cease any and all further questions on that subject. As you can see later on in that same interview, when Mr. Beane starts to make a statement in regards to the UDAA, which he was initially questioned on, you see Officer Brown indicate, *'No. You asserted your right to an attorney on that.* I can't talk to you about that particular matter anymore.' [emphasis added]

These admissions before the trial court preclude the prosecution from now taking a contrary position on appeal.[2] *Grant, supra*. We cannot condone a party making repeated concessions to the trial court about a critical legal conclusion, and then arguing to this Court that the same legal conclusion made by the trial court was in error. *Id*. That leaves us with the final issue on appeal, which is the same argument that the prosecution pressed before the trial court,

[1] We note that we have not been able to view the videotape containing defendant's interview or read a transcript of the interview because the prosecutor has failed to provide either in violation of MCR 7.210(C).

[2] In reviewing the motion transcript, it appears that the trial court spent very little time analyzing whether this was an unequivocal request for counsel, likely because both parties indicated to the court that it was.

ie., whether the police had to cease all questioning of defendant on any subject once he asserted his right to counsel.

If a defendant invokes his right to counsel, he may not be questioned unless a lawyer has been made available to him and is present, or unless the defendant himself initiates further communication. *Davis v US*, 512 US 452, 458; 114 S Ct 2350; 129 L Ed 2d 362 (1994). This rule "is *not* offense specific: Once a suspect invokes the *Miranda*[3] right to counsel for interrogation regarding one offense, he may not be reproached regarding any offense unless counsel is present." *McNeil v Wisconsin*, 501 US 171, 177; 111 S Ct 2204; 115 L Ed 2d 158 (1991) (emphasis in original), citing *Arizona v Roberson*, 486 US 675; 108 S Ct 2093; 100 L Ed 2d 704 (1988). Invocation of a defendant's right to counsel requires a statement that can "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis, supra* at 459. If a suspect makes an ambiguous reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," a questioning officer need not cease his interrogation. *Id*. (emphasis in original).

We initially note that the trial court did not commit clear error when it found that defendant did not initiate any further communication with the questioning officers, as there was record evidence supporting such a conclusion. And, as the trial court also ruled, we hold that defendant's assertion of his right to counsel acted as a "blanket prohibition" that prevented the police from questioning him about any other incidents. *McNeil, supra*. We therefore conclude that the trial court did not err when it suppressed defendant's confession. *Davis, supra* at 459; *McNeil, supra* at 177.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).